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June 9, 2020

VIA ECF

Honorable Pamela K. Chen  
United States District Judge  
United States District Court, Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, New York 11201

Re: *Freeman, et al. v. HSBC Holdings plc, et al.*, 18-cv-7359 (“*Freeman IP*”)  
*Bowman, et al. v. HSBC Holdings plc, et al.*, 19-cv-2146 (“*Bowman*”)

Dear Judge Chen:

We represent Commerzbank AG (“Commerzbank”) in the above-referenced cases. We write this pre-motion letter pursuant to Rule 3.A of Your Honor’s Individual Practices and Rules in connection with Commerzbank’s anticipated motion, pursuant to Federal Rule of Civil Procedure 54(b) and the Court’s inherent authority to revise its interlocutory orders, requesting modification of the Court’s Order dated June 5, 2020 (the “Order”), to dismiss Count 10 against Commerzbank for lack of personal jurisdiction.

The Court’s Order dismissed all of the ATA claims and the JASTA conspiracy claims in these cases against all defendants, with the exception of defendant Bank Saderat plc, “[f]or the same reasons articulated in *Freeman I*.” Order at 3. As the Court noted, this “includes dismissing Count 6 of the *Freeman II* and *Bowman* Complaints against Defendant Commerzbank for lack of personal jurisdiction,” *id.*, based on Your Honor’s prior ruling that allegations that Commerzbank transferred funds from the account of a German customer, “Orphans Project,” to an organization in Lebanon known as the “Martyrs Foundation,” failed to establish a basis for

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exercising specific personal jurisdiction over that claim, since “[n]one of the transactions Commerzbank allegedly executed for the Orphans Project were processed through the United States banking system or banks in New York,” Memorandum & Order at \*15 (Sept. 16, 2019), *Freeman, et al. v. HSBC Holdings plc, et al.*, No. 14 Civ. 6601 (PKC) (CLP), ECF No. 237 (“*Freeman I*”).

The Court’s Order also dismissed the JASTA aiding and abetting claims, including Count 10 against Commerzbank, for failure to state a claim. Order at 3. In addressing Count 10, Your Honor noted that it suffers from the same jurisdictional deficiencies as Count 6, “which is based on the materially same facts,” but declined to dismiss the claim on that ground because “Commerzbank has not moved to dismiss the Tenth Claim for lack of personal jurisdiction under FRCP 12(b)(2).” *Id.* at 7 n.8.

Commerzbank respectfully requests that the Court modify the Order to also dismiss Count 10 for lack of personal jurisdiction. The Court has the ability to make such a revision because the Order resolved “the liabilities of fewer than all the parties,” and accordingly “does not end the action as to any of the claims or parties and *may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties’ rights and liabilities.*” See Fed. R. Civ. P. 54(b) (emphasis added); see also *Buttaro v. City of New York*, 2017 WL 1906725, at \*1 (E.D.N.Y. May 8, 2017) (“[S]o long as the district court has jurisdiction over the case, it possesses inherent power over interlocutory orders, and can reconsider them when it is consonant with justice to do so”) (citing *United States v. LoRusso*, 695 F.2d 45, 53 (2d Cir. 1982)). Non-final orders can be modified under Rule 54(b) where, as here, there was an inadvertent error by a party. See *Ng v. HSBC Morg. Corp.*, No. 07 Civ. 5434, 2014 WL 4699648, at \*4 (E.D.N.Y. Sept. 22, 2014) (correcting motion order based on the defendants’ “genuine mistake” brought to the Court’s attention after motion order was issued).

Commerzbank moved to dismiss on the alternative ground of lack of personal jurisdiction in a footnote of defendants’ joint letter-motion. Defs. Jan. 6, 2020 Letter at 1 n.2, ECF No. 75 in *Freeman II* and ECF No. 34 in *Bowman*. Although Count 6 was named in this footnote and Count 10 was inadvertently omitted, Commerzbank requested dismissal “for the reasons set forth in the Court’s *Freeman I* Dismissal Order,” *i.e.*, the absence of any non-conclusory allegations connecting the alleged transfers between Orphans Project and the Martyrs Foundation to the United States. See *id.* As the Court noted in the Order, these same allegations underlie both Count 6 and Count 10. Order at 7 n.8. Plaintiffs have also acknowledged that the same allegations of fact underlie both claims. Pls. Jan. 13, 2020 Letter at 2 n.1, ECF No. 76 in *Freeman II* and ECF No. 41 in *Bowman* (arguing that Count 6 in *Freeman I* should also be treated as a JASTA aiding and abetting claim and noting that it was “formally pleaded” this way in *Freeman II* and *Bowman*).

“[T]o preserve the defense of lack of personal jurisdiction, a defendant need only state the defense in its first responsive filing and need not articulate the defense with any rigorous degree of specificity.” *Mattel, Inc. v. Barbie-Club.com*, 310 F.3d 293, 307 (2d Cir. 2002) (citing *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 162 F.3d 724, 730 (2d Cir. 1998)). Especially in light of this lenient standard and the abbreviated letter briefing that occurred, see Minute Order (Dec. 2, 2019), *Freeman II* and *Bowman*, Commerzbank respectfully submits that the personal jurisdiction defense it raised in the joint letter-motion was sufficient to preserve that defense as

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to Count 10 in addition to Count 6. To prevent manifest injustice, the Court should therefore revise its Order to also dismiss Count 10 for lack of personal jurisdiction. *See Ng*, 2014 WL 4699648, at \*1.

Respectfully submitted,

/s/ Alexis Collins

Alexis Collins

cc: All Counsel of Record (via ECF)